No. 89-1185

In The

Supreme Court of the United States

October Term, 1989

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY, et al.,

Petitioners,

v.

COMITE PRO RESCATE DE LA SALUD, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Resource Conservation and Recovery Act's domestic sewage exclusion for "solid or dissolved material in domestic sewage," 42 U.S.C. § 6903(27), applies only to "sanitary wastes" and, thus, does not include sewage from industrial facilities that contains a mixture of sanitary wastes (from such employee facilities as factory restrooms) and toxic wastes from industrial operations?

2. Whether the court of appeals was correct in relying upon long-standing Environmental Protection Agency regulations which allow mixed industrial and sanitary wastes to qualify for the domestic sewage exclusion only for purposes of the regulatory provisions of the Resource Conservation and Recovery Act and not for the remedial provisions of § 7003 of that Act?

PARTIES TO THE PROCEEDING

Respondents accept petitioners' list of the parties to the proceeding below.

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BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT OF THE CASE

Petitioners include ten private industries ("private petitioners") that discharge toxic wastes from buildings built and owned by petitioner Puerto Rico Industrial Development Company ("PRIDCO"). The wastes are discharged into a sewer system operated by petitioner Puerto Rico Aqueduct and Sewer Authority ("PRASA"). The industrial operations and the sewer system in question are located in the Guanajibo Industrial Park near

Mayaguez, Puerto Rico ("Industrial Park"). The respondents are a community group and present and past workers at the Industrial Park who were severely injured by exposure, at their places of work, to toxic gases which escaped as a result of the discharges of toxic wastes by the private petitioners to a defective sewer system. The industries at the Industrial Park were the only users of the sewer system in question here. No private residences were connected to this sewer system.[1]

Respondents filed suit in the United States District Court for the District of Puerto Rico seeking, *inter alia*, to enjoin the threat to their health caused by petitioners' conduct and for imposition of civil penalties.[2] This injunction was sought pursuant to Sections 7002 and 7003 of the Resource Conservation and Recovery Act

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[1] In December, 1987, the sewer system at the Industrial Park was disconnected from the PRASA-operated sewage treatment plant, which processed only the wastes from the Industrial Park, and was connected to a sewer system which led to another PRASA-operated sewage treatment plant which processes wastes from many other sources, including residential sources. This change does not affect respondents' RCRA claims arising before December, 1987.

[2] In their action before the district court, respondents also alleged violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* and the permitting and other regulatory requirements of RCRA, 42 U.S.C. §§ 6922, 6924, 6925 and 6930. Respondents also sought damages and other relief under the common law of Commonwealth of Puerto Rico. Those claims are not at issue here. Respondents' common law claims, for which pendent jurisdiction was sought, were dismissed only because of the district court's rejection of the RCRA claims and, upon reinstatement of those claims, the pendent claims would be revived.

("RCRA"), 42 U.S.C. §§ 6972 and 6973, which allow private citizens to sue to seek to abate an imminent and substantial endangerment created by the handling or disposal of solid or hazardous wastes.[3]

When Congress enacted RCRA, 42 U.S.C. §§ 6901 *et seq.*, it broadly defined "solid waste" to include:

> . . . any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, ...

42 U.S.C. § 6903(27).[4] Congress also specified certain narrow exceptions to this broad definition. One of those exceptions, known as the Domestic Sewage Exclusion ("DSE"), excludes "solid or dissolved material in domestic sewage" from the definition of "solid waste." *Id.* This case turns on the interpretation of that phrase.

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[3] Section 7002 of RCRA, 42 U.S.C. § 6972, authorizes citizens to bring suit to abate an imminent and substantial endangerment where suit could be brought by the Environmental Protection Agency under section 7003 of RCRA, 42 U.S.C. § 6973, and based on the same legal standards. S. Rep. No. 284, 98th Cong., 1st Sess. (1984) at 56-57. The court of appeals properly treated these sections as identical for all purposes relevant to this case. Pet. App. 14a-15a. In this brief, respondents refer to section 7003 only for simplicity of citation.

[4] "Hazardous wastes" are a subset of "solid wastes." 42 U.S.C. § 6903(5). If the substances disposed of by private petitioners and of concern to respondents are solid wastes, there is no controversy here that they are also hazardous wastes.

The court of appeals reversed the district court's grant of petitioners' motion for dismissal. Appendix A to Petitioners' Brief ("Pet. App."). The court of appeals held that the DSE, as set forth in RCRA, did not apply to a mixture of industrial and sanitary wastes discharged by industrial facilities to sewage treatment plants which received only wastes from those industrial sources. It further held that the Environmental Protection Agency ("EPA"), using the broad discretionary authority granted to it by Congress in RCRA, could choose to allow mixtures of sanitary and industrial wastes to qualify for the DSE for purposes of exempting such facilities from the *regulatory* provisions of RCRA, while refusing to allow such mixed wastes to be exempt from the section 7003 imminent and substantial endangerment provisions of RCRA.

The court also found that the highly general terms of the statute supported giving weight to the agency's interpretation of the terms of the statute. "[W]e interpret the statute as reflecting a congressional intent to give EPA considerable authority itself to interpret language like 'domestic sewage' and thereby fix, at the boundaries, the precise scope of the exception." Pet. App. at 11A.

The court specifically rejected the petitioners' argument that 40 C.F.R. § 261.4[5], binds EPA and the court, in

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[5] 40 C.F.R. § 261.4 states:

(a) *Materials which are not solid wastes.* The following materials are not solid wastes for purposes of this part: (1)(i) Domestic sewage; and (ii) Any mixture of domestic sewage and other wastes that

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interpreting all provisions of RCRA, to a definition of "domestic sewage" that includes mixtures of industrial and sanitary wastes where both originate from industrial facilities. The court cited two reasons for rejecting petitioners' argument. First, the regulation explicitly does not apply to section 7003, but applies only to Subtitle C, the regulatory portion, of RCRA.[6] The court pointed out that a distinction between Subtitle C definitions and those for section 7003 made sense because of the distinctions between those two portions of RCRA. *Id.* at 15a.

> Subtitle C contains highly detailed recordkeeping, notification, and permit requirements; to ease administrative burdens, EPA may want to include those factory pipes that contain only a little sanitary waste, but exclude those that contain little else. Sections 7002 and 7003, on the other hand, are invoked only to respond to imminent and substantial endangerments to health or the environment; in such a context, involving a present threat to public welfare and no ongoing administrative duties, EPA may

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passes through a sewer system to a publicly-owned treatment works for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

[6] 40 C.F.R. § 261.1(b)(1) provides that the regulation applies "only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA." 40 C.F.R. § 261.1(b)(2) further states that "[a] material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, is still a solid waste . . . if . . . in the case of section 7003 the statutory elements are established."

> want to include even those factory pipes that contain a relatively small proportion of industrial wastes.

Id. The court found nothing incongruous with EPA defining the domestic sewage exclusion in different ways in different contexts, particularly since Congress appears in this case to have implicitly delegated to EPA the authority to interpret the statute. *Id.* at 15a-16a.

In rejecting petitioners' argument concerning 40 C.F.R. § 261.4, the court also relied upon EPA's statement that the "definition simply refers to the kind of *residential* waste at issue." *Id.* at 14a. The fact that nothing is said about the source does not mean that it is irrelevant. *Id.*

In holding that mixtures of sanitary and industrial wastes are not exempted under the DSE from the remedial reach of Section 7003 of RCRA, the court of appeals also agreed with respondents and *amicus* EPA that the term "domestic sewage" should be read to mean sewage that comes from residences. The court found ample support for this conclusion. First, the court looked to the dictionary meaning of "domestic" which is " 'relating to the household or the family . . . connected with the supply, service and activities of households and private residences.' " Pet. App. at 10a *quoting* Webster's Third International Dictionary 671 (1976).

Second, the court looked to the language in the definition of "solid waste" and found that it referenced not only the type of waste but its source. Pet. App. at 10a. Therefore, looking to the context of the definition, "domestic" would appear to refer to the *source* of the waste.

Third, the court found that if one read the definition as referring only to the *type* of waste, rather than its source, then the Congressional purpose behind section 7003 of RCRA, to provide broad relief whenever an imminent and substantial endangerment was created, would become more difficult to achieve. *Id.* Since most industries have toilets for their workers, were the definition read to refer solely to the type of waste, potentially large amounts of waste might be exempted from the statute's scope, even though those wastes created an imminent and substantial endangerment. *Id.* at 10a-11a.

Fourth, the court read the legislative history of section 7003 as supporting the argument that the provision was to have a broad scope. Thus, "it would seem somewhat anomalous to interpret the *exception* broadly and thus significantly *narrow* the statute's broad reach." *Id.* at 11a.

The court of appeals reversed and remanded to the district court.

ARGUMENT

I. THERE ARE NO CONSIDERATIONS WHICH JUSTIFY GRANT OF THE PETITION.

The decision of the First Circuit is correct and does not conflict with the decision of any other federal court of appeals on the same matter. Nor do the petitioners argue that such a conflict exists.

The petition for *certiorari* provides no cogent justification for issuance of a writ. The petition, therefore, should be denied.

II. THE COURT OF APPEALS WAS CORRECT IN DETERMINING THAT THE DOMESTIC SEWAGE EXCLUSION DOES NOT PREVENT APPLICATION OF SECTION 7003 OF THE RESOURCE CONSERVATION AND RECOVERY ACT TO INDUSTRIAL WASTE STREAMS.

A. On Its Face, RCRA Does Not Support Petitioners' Contention That The Court Of Appeals Erred.

Petitioners offer as the core of their argument the proposition that the DSE is the boundary between regulation of the conduct of generators and disposers of hazardous wastes under the Clean Water Act and regulation of such conduct under RCRA. However, the provision of RCRA at issue in this case, Section 7003, is not the permitting section. Section 7003, does "not regulate conduct but regulates and mitigates endangerments." *United States v. Waste Industries, Inc.*, 734 F.2d 159, 164 (4th Cir. 1984). Thus, petitioners' argument misses the mark.

Petitioners' argument ignores the critical language of the statute itself. Significantly, at no point in their brief do petitioners attempt to demonstrate how the DSE, as stated in the statute, applies to their mixture of industrial and sanitary wastes. The RCRA definition of "solid waste," of which "hazardous waste" is a subset, 42 U.S.C. § 6903(27), provides:

> The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant,

> water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, *but does not include solid or dissolved material in domestic sewage*, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

42 U.S.C. § 6903(27) (emphasis added).

This definition excludes from "solid waste" "solid or dissolved material in domestic sewage." It is clear on its face that the exception as stated by Congress refers only to *domestic* sewage. It does not refer to *industrial* discharges. The court of appeals so held. Pet. App. at 10a-13a. Since 1980, when EPA promulgated the implementing regulations of RCRA, EPA has defined domestic sewage as "sanitary wastes," 40 C.F.R. § 261.4(a)(1)(ii) (1987), a definition which petitioners accept. Industrial discharges such as those of petitioners are not "sanitary wastes." That they are not is clear from the fact that industrial discharges are subject to a further separate exception in the same statutory definition, which excludes from RCRA coverage "industrial discharges which are point sources subject to permits under section 1342 of Title 33 . . . ," that is, section 402 of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* 42 U.S.C. § 6903(27).[7]

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[7] Domestic wastes can also be subject to section 402 of the Clean Water Act but, significantly, Congress did not include

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Petitioners ignore this central argument concerning the language of the statute itself and focus instead on the portion of the court of appeals opinion which equates "domestic wastes" with its preferred dictionary definition, "household wastes." Petitioners argue that because other sections of RCRA and other environmental statutes use the phrase "household wastes" and 42 U.S.C. § 6903(27) does not use that phrase, "domestic sewage" must not be synonymous with "household wastes."[8]

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them within the section 402 exception. Clearly, Congress intended to exclude all domestic wastes from the definition of "solid waste" but intended to exclude industrial wastes only under certain limited exceptions. If, as petitioners argue, domestic wastes include industrial wastes, then there would have been no need to include the section 402 exception.

[8] Petitioners also claim that EPA announced for the first time in its *amicus* brief that it believed that "domestic" wastes meant only "household" wastes. In fact, several years ago, EPA promulgated and issued *Guidance For Implementing RCRA Permit-By-Rule Requirements At POTWs* (July 21, 1987) in which it concluded that:

> Industrial waste which mixes with sanitary waste from on-site sanitary facilities for the employees does not necessarily fall under the domestic sewage exemption. In order to qualify for the domestic sewage exemption, the industrial waste must also mix in the municipal sewer system with untreated sanitary wastes from non-industrial sources.

Id. at 6. Although this guidance document is not a regulation, as its preamble indicates, it does nonetheless represent an EPA interpretation of its own regulations which substantially predates the filing of its *amicus* brief here. Contrary to petitioners'

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Whether domestic sewage includes both sanitary wastes from households and sanitary wastes from industrial operations is not controlling here because the wastes of concern in this case are the industrial wastes which were also discharged from the private petitioners' facilities. The unassailed and unassailable fact is that, on its face, the statutory definition of the DSE only excludes sanitary and not industrial wastes or mixtures of industrial and sanitary wastes from the definition of solid waste. Respondents here are complaining about the industrial wastes discharged into the sewer system and not the sanitary wastes.

Petitioners argue that the reason the DSE exists is because the Clean Water Act already regulates "solid and dissolved material in domestic sewage" by providing for pretreatment of all wastes discharged to sewer lines. Petitioners make a fatal error in this argument because the

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assertion, the document was "published" in that it was available to the general public and was distributed to all EPA regional offices and state personnel.

Such interpretations by an agency of its own regulations are entitled to substantial deference by reviewing courts. *See Northern Indiana Pub. Serv. Co. v. Isaac Walton League of America*, 423 U.S. 12, 15 (1975) (*per curiam*); *Buschmann v. Schweiker*, 676 F.2d 352, 355 (9th Cir. 1982).

In its *amicus* brief EPA also cited several additional regulations and pre-existing agency policies in which EPA had treated sanitary wastes from industrial sources differently than sanitary wastes from households. Brief for United States As Amicus Curiae at 20-22. These additional regulatory positions give added weight to the EPA's administrative interpretation of the DSE contained in the above-noted guidance document.

pretreatment provisions of the Clean Water Act only apply if wastes are being discharged to a publicly owned treatment works ("POTW"). 33 U.S.C. § 1317(b). There is no requirement in the statutory DSE that the wastes be discharged to a POTW. Thus, if the DSE is read to include industrial wastes, it would exclude from RCRA both pretreated and non-pretreated industrial wastes. Such a massive loophole was never intended by Congress and petitioners could not and do not urge its existence.

The statutory language alone, therefore, cannot support petitioners' conclusion that the court of appeals erred in concluding that the discharges of hazardous waste at issue here are not covered under section 7003.

B. EPA's Regulations Do Not Support Petitioners' Contention That The Court Of Appeals Erred.

Petitioners attempt to escape the clarity of the statutory language by relying on a regulation promulgated by EPA in 1980 and consistently applied by EPA since that time. The regulatory provision, found in 40 C.F.R. § 261.4(a)(1) (1987), defines "solid wastes" to exclude domestic sewage and "any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment." It is this regulatory language, and only this language, which could provide a basis for the exclusion of a mixture of domestic and industrial wastes from the definition of solid waste in RCRA.[9] However, this mixed waste extension of the DSE,

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[9] In the explanation accompanying these regulations, EPA makes clear that the "other wastes" which must mix with

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and the regulatory definition of "solid waste" of which it is a part, explicitly do not apply to Section 7003.

This mixed waste extension of the DSE upon which petitioners have relied appears in 40 C.F.R. Part 261. Part 261, however, includes the following statement in the "Purpose and scope" section:

> This part identifies only some of the materials which are solid wastes and hazardous wastes under sections 3007, 3013, and 7003 of RCRA. A material which is not defined as a solid waste in this part, or is not a hazardous waste identified or listed in this part, is still a solid waste and a hazardous waste for purposes of these sections if:
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> * * *
>
> (ii) In the case of section 7003, the statutory elements are established.

40 C.F.R. § 261.1(b)(2) (1987).

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domestic sewage to qualify for the DSE include discharges from industrial facilities. EPA Regulations, Hazardous Waste Management System, Identification and Listing of Hazardous Waste, 45 Fed. Reg. 33084, 33097 (May 19, 1980) ("Regulations"). Of course, if such discharges were already covered by the statutory DSE, there would have been no need for EPA to provide this expanded definition or to go to such lengths to justify the extension of the DSE to mixed waste streams. EPA was obviously aware of the fact, cited by petitioners, that industrial dischargers always include some non-industrial wastes from their plant bathrooms in their sewer discharges. Nonetheless, EPA felt compelled to write a specific regulation to cover discharges from industrial operations which mix with domestic wastes in a sewer system, obviously referring to wastes coming from places other than the industrial facilities themselves.

When it adopted this language, EPA made clear its intent, based upon its analysis of Congress' intent, that section 7003 operate unrestricted by the regulatory limitations on the definition of hazardous and solid wastes contained in Part 261.

> Second, although this regulation limits what may be regulated as a "hazardous waste" under Sections 3002 through 3005 and 3010 of RCRA,[10] *it does not limit* those materials which may be considered "hazardous wastes" under other sections of the statute, particularly Section 3007 (which authorizes EPA to obtain information on "hazardous waste" in order to develop regulations or enforce RCRA) and Section 7003 (which authorizes the Agency to institute civil actions to abate imminent and substantial hazards caused by "hazardous wastes"). Unlike Sections 3002 through 3004 and Section 3010, Congress did not confine the operations of Sections 3007 and 7003 to "hazardous wastes *identified or listed under this subtitle*" (emphasis added). To avoid future confusion on this point, EPA has stated it explicitly in § 261.1(b).

Regulations, 45 Fed. Reg. 33084, 33090 (May 19, 1980) (first emphasis added; second emphasis in original). The court of appeals specifically cited this portion of the regulations in rejecting petitioners' arguments. Pet. App. at 14a-15a.[11]

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[10] Sections 3002-3005 and section 3010 of RCRA, 42 U.S.C. §§ 6922-25 and 6930, refer to permitting and notification requirements under RCRA.

[11] Petitioners argue that the First Circuit inappropriately allowed the EPA's long-standing mixed waste extension of the DSE to draw a distinction between the DSE as it applies to

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In short, the industrial wastes discharged to the sewer system in the Industrial Park are solid and hazardous wastes for purposes of section 7003 if they meet the statutory definitions of solid and hazardous wastes. The industrial discharges are not subject to any regulatory extension of the DSE. Since the definition of solid waste contained in RCRA includes "solid, liquid, semisolid, or contained gaseous material resulting from industrial . . . operations," only excluding industrial discharges if they are regulated point sources under the Clean Water Act, and since petitioners' discharges meet this definition of "solid wastes," section 7003 is applicable to those discharges.

III. THE COURT OF APPEALS WAS CORRECT IN RELYING UPON THE EPA POSITION ARTICULATED IN ITS *AMICUS CURIAE* BRIEF BECAUSE IT IS LONG-STANDING AGENCY POLICY.

Petitioners argue that EPA announced for the first time in its *amicus* brief below its position on the definition of the DSE and its applicability to section 7003. Brief of Petitioners at 29 n.28. Petitioners assert that it is inappropriate for the court to rely on such allegedly newly-articulated views as agency policy. However, the long-standing regulatory history of the mixed waste extension

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wastes subject to regulation under 42 U.S.C. §§ 6922-6925, 6930 (the regulatory provisions) and wastes subject to the remedial authority of 42 U.S.C. § 6973. If petitioners thought that distinction was untenable, the time to challenge it was in 1980, when the regulation was promulgated. RCRA specifically forbids challenging the validity of a regulation in an action, such as this one, to enforce the provisions of the act against regulated companies. 42 U.S.C. § 6976(a).

of the DSE, 40 C.F.R. § 261.4 (1987), confirms that it was intended to apply only to the regulatory provisions of Subtitle C of RCRA and not to section 7003.

In enacting the mixed waste stream extension of the DSE in 1980, EPA focused on the fact that industrial wastes that enter the sewer system and then mix with domestic wastes will qualify for the DSE only if they are regulated under the Clean Water Act through its regulation of sewage treatment plant operations and through its imposition of pretreatment requirements on POTWs. Regulations, 45 Fed. Reg. 33084, 33097 (May 19, 1980). Regulation under the Clean Water Act provided EPA with the confidence that the wastes would "be properly treated" and that the "administrative clarity [created by not seeking to use RCRA to regulate industrial waste streams before they mix with domestic wastes] in this otherwise complicated regulatory program warrants such an approach." *Id.*

This articulation of EPA policy occurred ten years ago and EPA has never deviated from it. The concern about administrative clarity and desire to draw a clear line between the Clean Water Act and RCRA only makes sense in the context of, and was only intended to cover, the regulatory provisions of RCRA contained in Subtitle C and not the remedial provisions of section 7003 contained in Subtitle G of RCRA. Section 7003 applies only after the discharge has occurred and only if an imminent and substantial endangerment is created.[12] It is for this

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[12] In order to ensure that, regardless of compliance with any other provision of RCRA, no hazardous wastes would

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reason that Section 7003 is viewed as remedial and not regulatory. As the Fourth Circuit has stated: "section 7003 appears in subtitle G, and it is designed to deal with situations in which the regulatory schemes break down or have been circumvented." *United States v. Waste Industries, Inc.*, 734 F.2d at 164. It is also for this reason that the policy favoring a mixed waste extension of the DSE is inapplicable to section 7003. It is only when the regulatory reach of the Clean Water Act that justified the mixed waste extension has failed to protect the public health and safety by failing to "properly" treat the wastes that Section 7003 applies or would be needed.[13]

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endanger human health or the environment, Congress enacted section 7003 of RCRA, 42 U.S.C. § 6973, which provides that "[n]otwithstanding any other provision" of RCRA in any situation where the handling, treatment, storage, or disposal of hazardous wastes might create an "imminent and substantial endangerment to health or the environment," action can be taken to abate the endangerment. This provision has been found by courts to be "a broadly applicable section dealing with the concerns addressed by the statute as a whole," *United States v. Waste Industries, Inc.*, 734 F.2d 159, 164 (4th Cir. 1984), and one which "does not regulate conduct but regulates and mitigates endangerments." *Id.* Congress has declared that the "primary intent of the provision [section 7003] is to protect human health and the environment." S.Rep.No. 284, 98th Cong., 1st Sess. at 59 (Oct. 28, 1984).

[13] Petitioners' anxiety about the implications of confirming that section 7003 of RCRA can apply to discharges to sewer systems is unwarranted. Because this section is designed to address conditions created by discharges of hazardous wastes,

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Further confirmation of the long-standing EPA position that the provisions of sections 7003 are available to address problems created even where the DSE applies is found in the report issued by EPA in response to the Congressional direction to EPA to study the effect of the DSE and recommend any legislative changes it believed were required. Report to Congress on the Discharge of Hazardous Wastes to Publicly Owned Treatment Works (The Domestic Sewage Study), February 1986. This EPA report generally supported the continued use of the DSE, although it noted that discharges of hazardous wastes to sewer systems could and had produced releases of toxic gases which could be harmful to the public. Domestic Sewage Study at 1-11, 4-8, 4-9. One significant basis for EPA's willingness to continue the DSE, while studying

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"notwithstanding" compliance with all regulatory provisions, Congress has already decreed that those who generate or dispose of hazardous wastes may be liable if the consequence of their lawful conduct is to endanger human lives. Petitioners are no more at risk than any other hazardous waste generator or disposer. Congress has properly concluded that the human health risk is more important to abate than the convenience of those causing that risk. In addition, petitioners argue that their discharges are subject to the Clean Water Act imminent and substantial endangerment provision which, if a correct interpretation of the Clean Water Act, would mean that petitioners would be subjected to the same inconvenience of being forced to abate an imminent and substantial endangerment even though they were in full compliance with all regulatory requirements. The imminent and substantial endangerment provisions of the Clean Water Act and RCRA provide identical remedies. Section 504 of the Clean Water Act, 33 U.S.C. § 1364, and Section 7003 of RCRA, 42 U.S.C § 6973.

the problem further, was a determination that, without statutory changes, existing controls provided a mechanism to address the problems caused by a release of toxic gases from a sewer system. Domestic Sewage Study, E-5 to E-6. In particular, the report concluded that section 7003 of RCRA was available to address problems created by the release of toxic gases from a sewer system where the DSE applies:

> In addition, in appropriate cases, the Agency may address air emission problems using § 7003 [of RCRA] where those problems may present an imminent and substantial endangerment of human health or the environment.

Domestic Sewage Study, at 6-46.[14]

In this context, it was entirely appropriate for the court of appeals to rely upon the *amicus* brief of the EPA. The purpose of *amicus* briefs is to provide courts with aid in analyzing legal questions. *Sony Corp. v. Universal Studios*, 464 U.S. 417, 434 n.16 (1984). Rather than being partisan, *amicus* briefs are intended to provide the court with information on matters of law about which there could be doubt or mistake. *New England Patriots Football*

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[14] Petitioners cite the Domestic Sewage Study to support the proposition that EPA did not believe there was any reason to change the DSE in 1986. From this correct summary of the findings of the study, petitioners then leap to the conclusion that therefore the decision of the court of appeals is erroneous because, they assert, it effected a change in the DSE. As the previous discussion demonstrates, the DSE does not and never has been intended to prevent the application of section 7003 to mixed industrial and sanitary wastes. Petitioners' assertion that such a determination represents a change in the DSE ignores the regulatory history of the DSE and is baseless.

Club, Inc. v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). As the court of appeals in this case pointed out, Pet. App. at 17a, that is precisely the role which Congress explicitly anticipated for the EPA in the context of citizen suits:

> It is expected that EPA and the Department of Justice will carefully monitor litigation under this provision and file, where appropriate, *amicus curiae* briefs with the court in order to assure orderly and consistent development of caselaw in this area.

H.R. Rep. No. 198, 98th Cong., 1st Sess. 53 *reprinted in* 1984 U.S.Code Cong. & Admin. News 5576, 5612.

Whether agency interpretations are logically consistent with statutory language is one factor in determining whether weight should be given to agency interpretations. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41 (1981). As shown above, the *amicus* position is not inconsistent with either prior agency positions or the statute.

Petitioners also argue that an agency position that involves advocacy and nothing more is not entitled to deference when courts are construing a statute. Petitioners rely upon *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), for the proposition that the court will not rely on the litigating position of agency counsel, where the agency has not previously articulated an administrative position on the questions at issue. 109 S.Ct. at 473. The circumstances in *Bowen*, however, are significantly different than those in this case. In the first place, EPA is not attempting here a "post hoc" rationalization of its own actions. Second, EPA is not in the

position of defending a challenge to its own actions. Further, the present interpretation offered in its *amicus* brief is not contrary to prior EPA positions. There appears here to be no conflict with Congressional intent as was found in *Bowen*. Finally, unlike in *Bowen*, the position offered by EPA is a reasoned and consistent interpretation of the DSE and section 7003. The *Bowen* rationale, therefore, does not apply.

Similarly, *Investment Company Institute v. Camp*, 401 U.S. 617 (1971), also cited by petitioners, is inapposite. In that case, the Comptroller of the Currency had neither expressed a position nor provided any rationale for the questioned regulation until the regulation was challenged. The Court found the Comptroller's arguments in the litigation to be "post hoc rationalizations" which could not substitute for reasoned justifications offered in the course of adopting a regulation. The Court concluded that the regulation was invalid and a violation of the banking laws. There is here no issue of whether an EPA regulation is invalid or violative of the environmental laws. EPA is not in the position of offering "post hoc rationalizations" for its actions.

Since EPA's position is consistent both with its prior positions and with RCRA, the court of appeals was justified in giving the *amicus* brief deference.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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February 21, 1990